Filed 10/24/12 In re Donovan J. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re DONOVAN J., a Person Coming Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

DONOVAN J.,

Defendant and Appellant.

_____/

A134682

(Alameda County Super. Ct. No. SJ111798801)

The juvenile court denied Donovan J.'s (the minor) motion to suppress an out-of-court identification and found true allegations that he committed attempted second degree robbery (Pen. Code, § 664/211),[1] displayed a replica firearm in a threatening manner (§ 417.4), and intentionally interfered with business operations (§ 602.1). The court adjudged the minor a ward of the court and placed him on probation.

On appeal, the minor contends the court erred by denying the motion to suppress because the field showup was "unduly suggestive and unnecessary" and unreliable. We disagree and affirm.

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

In a Welfare and Institutions Code section 602 petition, the People alleged the minor committed attempted second degree robbery (§§ 664/211 (Count One)) and assault with force likely to cause great bodily injury (§ 245, subd. (a)(1) (Count Two)). The petition also alleged the minor displayed a firearm in a threatening manner (§ 417.4 (Counts Three & Four)) and intentionally interfered with business operations (§ 602.1 (Count Five)). The allegations in the petition arose out of one incident on November 12, 2011 and another on November 19, 2011.

The November 19, 2011 Incident

At 5:45 p.m. on November 19, 2011, David N. (David) exited the MacArthur BART station and began walking home along Telegraph Avenue in Oakland.[2] He was wearing glasses and carrying a backpack. It was dark and cloudy. David noticed four male African American "teenagers . . . just loitering around" on the sidewalk 29 feet in front of him. One teenager was wearing a gray hooded sweatshirt and another — who David later identified as the minor — was wearing a dark blue or black and red jacket. David walked behind the group for about a block; he crossed the street after the teenagers began taking "turns turning around and look[ing]" at him. He saw the minor and the other teenagers look at him; he felt "uncomfortable and uneasy."

About 10 blocks and 10 to 15 minutes later, David was walking near a grassy area near the intersection of Redondo Avenue and Cavour Street. The area was "not well lit." David heard some "rustling behind [him] like some footsteps stepping on . . . leaves" and saw a teenager wearing a gray hooded sweatshirt. It was the same teenager David had seen earlier on Telegraph Avenue. He tackled David from behind and David fell face-first into the grass. His glasses did not fall off. David stood up and the boy wearing the gray sweatshirt "bear hugged" him and knocked him back to the ground. He landed on

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[2] The facts pertaining to the incident on November 12, 2011 are not relevant to the minor's claims on appeal. Our summary of the facts is taken from the transcript of the combined hearing on jurisdiction and the motion to suppress.

his shoulder and hit his head. As David tried to get up, he stumbled and was pushed into the street. David hit his head on the pavement.

The group made a semicircle around David, standing about a foot from him. At that point, David had lost his glasses so he "couldn't tell facial features." He knew, however, that the boys around him were the same teenagers he had seen on Telegraph Avenue because he could "see the colors of their clothes." One of the assailants told David to give up the backpack. David called for help and the boys ran away. Then David ran home and his fiancée called the police. Between five to ten minutes later, the police arrived and he described the people involved in the incident to the police.

The Showup

At 6:22 p.m., Oakland Police Officer Patrick O'Donnell responded to a call from dispatch of a "an assault in progress" on Cavour Street and Redondo Avenue. Dispatch informed Officer O'Donnell that one of the four African American male suspects was "wearing a black sweater-jacket type with a red hood." Officer O'Donnell saw an individual matching the description — whom he later identified as the minor — about a block from the crime scene. The minor looked "very surprised and nervous" and "appeared to be trying to think about ducking behind the car[.]" Officer O'Donnell ordered the minor and his companion, who was a few feet away, to stop. After Officer O'Donnell told the two boys why he was detaining them, the minor blurted out: "I didn't . . . I was just with them." Officer O'Donnell arrested the minor and his companion. Another Oakland Police Officer, Brad Young, contacted David at approximately 6:45 p.m. and asked him whether he could identify his assailants. David said, "he might be able to[.]"

The showup took place at 7:00 p.m. around the corner from the crime scene. It was dark and "drizz[ling]" but the street lights were illuminated. During the showup, David sat in the right rear passenger seat of Officer Young's patrol car, about 20 to 30 feet from the minor and his friend. He wore a new pair of glasses. Nothing obstructed David's view and the lighting was adequate. Before conducting the showup, Officer Young told David that two people had been stopped who "may or may not be

handcuffed" and admonished him that it was "just as important to identify somebody as it is to not identify them[.]" He also explained that being handcuffed "should not influence" David's decision. Officer Young directed David to tell him if he "did not know who did it or was not sure[.]"

The minor and his companion were sitting near each other on a low wall near the patrol car. David could not see their hands. Officer Young presented the suspects to David one at a time and illuminated them with a spotlight. Officer Young presented the minor's companion first. David identified him without hesitation, saying "that's him." When Officer Young presented the minor, David hesitated for about 20 seconds and said, "yes, he was there." David was "certain" the minor was one of the boys involved in the incident. He identified the minor and his companion primarily based on their clothing. David explained his identification of the minor was based "mostly" on his observation during the attempted robbery rather than his observation of the minor on Telegraph Avenue.

The Denial of the Motion to Suppress

The minor moved to suppress the identification. At the combined hearing on jurisdiction and the motion to suppress, defense counsel argued the showup was suggestive because "the police showed Mr. Nguyen both boys at the same time . . . . Mr. Nguyen at no point was asked to look at each person without the prejudice that comes with guilt by association." Counsel also contended the showup was not "trustworthy" because David "lost his glasses very early in the attack and he could not identify anybody's faces, and he was going based purely on clothing description." Counsel added, "the police officers compounded that error at the scene because they didn't ask [Nguyen] . . . are you making this [identification] based on the observation of the four people who were ahead of you or based on your observation of the four people at the scene of the [attempted robbery]."

In response, the prosecutor argued David "was very clear that he wasn't basing his identification just on having seen the four of them walk on Telegraph . . . . It was a combination of both" seeing the teenagers on Telegraph Avenue and during the crime.

At the conclusion of the hearing, the court denied the motion to suppress. It considered the "totality of the circumstances which consisted of that 10 to 15 minute walking period, the recognition or notation of the individuals prior to, the individuals' close presence during the attempted robbery, specifically the formation of a semicircle where it was abundantly apparent based on the individual in the gray sweatshirt's demeanor, conduct, and explicit statements that an attempted robbery was underway. Both minors . . . assisted through their presence, their stance, and positioning in the commission of that offense."

The court found true the allegations in Counts One, Three, and Five, declared the minor a ward of the court, and placed him on probation.

DISCUSSION

"'Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 698.) The defendant bears the burden of demonstrating "'the identification procedure resulted in such unfairness that it abridged his rights to due process. [Citation.]' [Citations.]" (*People v. Sanders* (1990) 51 Cal.3d 471, 508.) The defendant must show the procedure was both unduly suggestive and unfair "'as a demonstrable reality, not just speculation.' [Citation.]" (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) "We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943.)

The Showup Was Not Unnecessarily Suggestive

Relying on out-of-state authority and law review articles, the minor contends "individual show-ups should be abolished." He concedes, however, that California law permits the use of in-field identifications "so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 (*Carlos M.*).) We are bound to follow

California law (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) which "favors field identification measures when in close proximity in time and place to the scene of the crime[.]" (*In re Richard W.* (1979) 91 Cal.App.3d 960, 970 (*Richard W.*); *Carlos M., supra,* 220 Cal.App.3d at p. 387.) We decline, as the minor urges, to "join the number of jurisdictions choosing to abolish show-ups . . . ."

The showup here was not unduly suggestive. Officer Young did not impermissibly "suggest something" to David before or during the showup. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 413.) Officer Young instructed David before the showup that the two suspects "may or may not be handcuffed." He admonished David that it was "just as important to identify somebody as it is to not identify them" and explained that being handcuffed "should not influence" David's decision. Officer Young also told David to tell him if he "did not know who did it or was not sure[.]" The showup here is similar to the one used — and approved — in *Carlos M.*, where the appellate court rejected the appellant's claim that a "'one-person show-up, at [a] hospital . . . was impermissibly suggestive because appellant was handcuffed when viewed by the victim, and because appellant was shown to the victim immediately after she had positively identified another suspect." (*Carlos M., supra,* 220 Cal.App.3d at p. 386, fn. omitted.) As the *Carlos M.* court explained, "[t]he record is devoid of any indication that police told the victim anything to suggest the people she would be viewing were in fact her attackers. While appellant claims the handcuffs influenced the victim to believe appellant was involved, the mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification. [Citation.] Appellant also argues the victim, having first been shown appellant's companion and having identified him, could well have assumed that appellant must also have been involved . . . . The record thus demonstrates the victim was amply able to distinguish persons she recognized from persons she did not recognize, and the fact a recognized attacker was shown with a companion did not influence her to assume that companion must also have been involved." (*Id.* at pp. 386-387.)

The same is true here. First, the showup occurred within an hour of the incident, around the corner from where the crime occurred, when David's recollection of the incident was fresh in his mind. (*People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219.) Second, there is no evidence suggesting the police told David "anything to suggest the people [he] would be viewing were . . . [his] attackers." (*Carlos M., supra,* 220 Cal.App.3d at p. 386.) And as in *Carlos M.*, the presence of handcuffs on the minor and his companion were "not so unduly suggestive as to taint the identification. [Citation.]" (*Ibid.*) In addition, David testified he could not see the handcuffs. Moreover, numerous "cases have . . . held that in-field identifications when the suspect was . . . handcuffed are admissible." (*Richard W., supra,* 91 Cal.App.3d at p. 970, citing cases.) Finally, there is no indication David assumed the minor was involved in the incident merely because he was presented second. At the showup, David stated, "yes he [the minor] was there," and at the hearing on the motion to suppress, David testified he was "certain" the minor was involved. (*Carlos M., supra,* 220 Cal.App.3d at pp. 386-387.)

The minor suggests the showup was somehow invalid because "[t]here were no exigent circumstances preventing police from constructing a live lineup." No such exigent circumstances are necessary. As we have already stated, "the law *favors* field identification measures when in close proximity in time and place to the scene of the crime . . . ." (*Richard W., supra,* 91 Cal.App.3d at p. 970, italics added.) Here, the showup occurred within an hour of the incident, near the crime scene.

"It is well settled that 'weighing the respective individual and societal interests to be served,' the advantages of prompt identification or elimination of suspects through an in-field showup outweigh the potential prejudice of such a procedure to the suspect." (*People v. Rodriguez* (1987) 196 Cal.App.3d 1041, 1049, quoting *People v. Dampier* (1984) 159 Cal.App.3d 709, 713.) Moreover, a principal function of a showup "'is a prompt determination of whether the correct person has been apprehended. [Citation.] Such knowledge is of overriding importance to law enforcement, the public and the criminal suspect himself. [Citation.] An in-the-field showup is not the equivalent of a lineup. The two procedures serve different, though related, functions, and involve

different considerations for all concerned.'" (*Rodriguez*, at p. 1049, quoting *Dampier*, at pp. 712-713.)

We conclude the showup was not unduly suggestive and the court properly denied the motion to suppress the identification.

David's Identification Was Reliable

Assuming for the sake of argument the showup was unduly suggestive, we would conclude the identification was "nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. [Citation.]" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835; *Ochoa, supra,* 19 Cal.4th at p. 412 ["'[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends'" citation omitted.)

Here, the identification was reliable under the totality of the circumstances. First, David had an opportunity to view the minor on Telegraph Avenue *and* while he was being attacked. Second, David paid careful attention to the teenagers while he walked behind them on Telegraph Avenue, noting their appearance and the clothes they were wearing. He also noticed the clothes they were wearing as they attacked him. David testified the minor and his companions were standing about a foot from him after he fell to the ground. We are not persuaded by the minor's claim that the identification was unreliable because David lost his glasses during the attack and could not "recognize any of [the teenagers'] facial features, only the colors of their clothing." First, David *was* able to see the color of the minor's clothes without his glasses and he noticed the minor was wearing the same clothing during the attack as he had been wearing on Telegraph Avenue. Second, David positively identified the minor at the showup and testified he was "certain" the minor was present during the attack. Finally, the showup occurred a short time after the incident and under conditions adequate to permit David to see the

suspects clearly. We reject the minor's contention the identification was somehow unreliable.

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.